IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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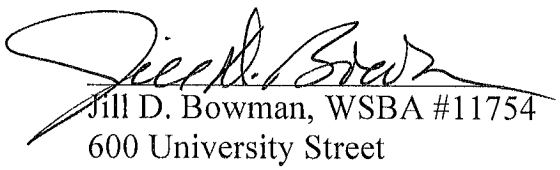
| DAVID MOELLER,<br><br>Appellant/<br>Cross Respondent,<br><br>v.<br><br>FARMERS INSURANCE COMPANY OF WASHINGTON and FARMERS INSURANCE EXCHANGE,<br><br>Respondents/<br>Cross Appellants. | 84500-0<br>No. 30880-1-II<br><br>STATEMENT OF ADDITIONAL AUTHORITIES |

Pursuant to RAP 10.8, Respondents/Cross Appellants Farmers Insurance Company of Washington and Farmers Insurance Exchange respectfully call the Court's attention to two recent decisions, Davis v. Farmers Ins. Co. of Arizona, ____ P.3d ____, 2006 WL 2545870 (N.M.Ct.App. June 13, 2006), cert. granted (Sept. 13, 2006) and Sims v. Allstate Ins. Co., 365 Ill.App.3d 997, 851 N.E.2d 701, 303 Ill. Dec. 514 (Ill.Ct.App. May 31, 2006), decided

after the oral argument on January 7, 2005 in this case. See attachment. Both cases address the issue whether first-party insureds can recover any collision-related "diminished value" of their vehicles in addition to having their vehicles fully repaired at the insurer's expense.

DATED this 15th day of September, 2006.

STOEL RIVES LLP



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Court of Appeals of New Mexico.
Robert DAVIS, Individually and as a Representative of a class of persons within the State of New Mexico, Plaintiff-Appellant,
v.
FARMERS INSURANCE COMPANY OF ARIZONA, and each affiliate within Farmers Insurance Group, a joint venture, Defendants-Appellees.
No. 25,312.

June 13, 2006.
Certiorari Denied, No. 29,895, July 31, 2006.

Background: Insured brought action against automobile insurer to recover diminished value of adequately repaired vehicle. The District Court, Bernalillo County, Valerie A. Mackie Huling, D.J., entered summary judgment in favor of insurer. Insured appealed.

Holding: The Court of Appeals, Kennedy, J., held as a matter of first impression that the policy did not cover diminution in value.
Affirmed.

[1] Insurance 1808

217k1808

[1] Insurance 1810
217k1810
Courts construe the insurance policy as a whole and determine whether ambiguities exist in the language of the contract.

[2] Insurance 1822
217k1822

[2] Insurance 1855
217k1855
When a term is undefined in insurance policy, courts may look to that term's usual, ordinary, and popular meaning, such as found in a dictionary.

[3] Insurance 1808
217k1808
A split in legal authority may be indicative of an ambiguity in the policy, but does not establish one.

[4] Insurance 1832(1)
217k1832(1)
When an ambiguity is found in an insurance policy, courts liberally construe the policy in favor of the insured.

[5] Insurance 1822
217k1822
Courts give to the language in insurance policy its plain and ordinary meaning.

[6] Insurance 1808
217k1808

[6] Insurance 1827
217k1827
Courts do not strain or torture the language in order to create an ambiguity in an insurance policy.

[7] Insurance 1809
217k1809
If the language in an insurance policy is clear, courts must then enforce the contract as written.

[8] Insurance 2703
217k2703

[8] Insurance 2718
217k2718

[8] Insurance 2719(2)
217k2719(2)
Diminished market value of adequately repaired vehicle was not "direct and accidental loss of or damage to" insured vehicle within the meaning of automobile policy coverage for such loss or damage; the coverage was not broad enough to cover any loss to the pre-collision position of the consumer, and the loss of market value could not be shoe-horned into coverage for direct damage to truck.

[9] Insurance 2719(2)
217k2719(2)
Automobile policy coverage for cost to repair or replace damaged property was not a promise to pay for diminished market value.

[10] Insurance 2719(2)
217k2719(2)
The tort concept of making the injured whole does not belong in interpretation of automobile policy covering cost to repair or replace damaged property.

[11] Insurance 2719(2)

217k2719(2)
Automobile insurer's obligation to pay cost to repair or replace damaged property with other of like kind and quality did not require the insurer to pay for diminution in market value; "like kind and quality" was not meant to modify "repair," and even if the term modified "repair," interpreting the clause to provide coverage for diminished market value was unreasonable.

[12] Insurance 2719(2)
217k2719(2)
Automobile insurer's obligation to pay the loss in money or repair or replace damaged property did not require the insurer to pay diminished market value.

[13] Insurance 2719(2)
217k2719(2)
Paying diminished market value of adequately repaired vehicle could not be read into automobile insurer's options of repairing or replacing the vehicle or making cash payment, where the insurer exercised the option to repair and did so adequately.

[14] Insurance 3360
217k3360
Automobile insurer did not breach of duties of good faith and fair dealing by refusing to pay diminished value of adequately repaired vehicle; the insurer complied with the express terms of the policy.

[15] Insurance 3335
217k3335

[15] Insurance 3419
217k3419
Where an insurer acts in accordance with the express language and obligations under an insurance policy, there is no violation of an implied covenant of good faith and fair dealing.

[16] Insurance 3363
217k3363
Automobile insurer that paid to repair vehicle was not required to explain to insured uncertainties in the law when denying coverage for diminution in market value.

[17] Appeal and Error 170(1)
30k170(1)
Insured did not preserve argument that automobile insurer was required to declare a total loss, rather than repairing vehicle; the insured never brought the argument to the trial court's attention.

Appeal from the District Court of Bernalillo County, Valerie A. Mackie Huling, District Judge.

Morgan Law Office, Limited, Ron Morgan, Albuquerque, NM, Whitney Buchanan, P.C., Whitney Buchanan, Albuquerque, NM, for Appellant.

Rodey, Dickason, Sloan, Akin & Robb, P.A., Andrew G. Schultz, Albuquerque, NM, Jackson Walker, L.L.P., Thomas T. Rogers, Mark L. Walters, Austin, TX, for Appellees.

OPINION

KENNEDY, Judge.

***1** {1} The dispute in this case concerns coverage under an automobile insurance policy. The question in this appeal is whether, under Plaintiff's collision coverage, Farmers Insurance Company (Farmers) must pay for the vehicle's loss of market value on top of adequately repairing the damaged vehicle. The trial court granted summary judgment in favor of Farmers and Plaintiff appeals.

{2} This is an issue of first impression in New Mexico. There is a nationwide split in authority on whether, under policies like Plaintiff's, insureds can recover the diminished market value of their vehicle after having the vehicle fully and adequately repaired. While this question must always depend upon the actual language of the insurance policy, the language in certain coverage provisions has been analyzed extensively in other jurisdictions. Today, we choose to follow the majority trend towards disallowing recovery for the diminished market value under the terms of Plaintiff's insurance policy. We affirm.

BACKGROUND AND FACTS

{3} Two months after buying a new truck, Plaintiff wrecked it. He was insured by Farmers, who adequately repaired the truck. After the repairs were completed, Plaintiff traded his truck in for another new one. Plaintiff accepted as a trade-in value $15,000 less than he estimated his old truck was worth before it was wrecked. Plaintiff then claimed that he was entitled to payment for this "loss in market value" under his insurance policy. Farmers disagreed, and refused to pay this claim.

{4} Part IV of Plaintiff's insurance policy stated that Farmers would "pay for loss to your insured car caused by collision ." This section defined "loss" as

the "direct and accidental loss of or damage to your insured car, including its equipment." In the "Limits of Liability" section, the policy stated that Farmers' "limits of liability for loss shall not exceed ... [t]he amount which it would cost to repair or replace damaged ... property with other of like kind and quality; or with new property less an adjustment for physical deterioration and/or depreciation." In the "Payment of Loss" section, Farmers stated that it would "pay the loss in money or repair or replace damaged ... property."

{5} Plaintiff filed a complaint against Farmers claiming: (1) breach of contract, (2) violation of the covenant of good faith and fair dealing, (3) violation of the New Mexico Insurance Code, (4) violation of the New Mexico Unfair Practices Act, and (5) breach of fiduciary duty. Farmers moved to dismiss the complaint and Plaintiff moved for summary judgment. The trial court denied Plaintiff's motion for summary judgment and granted summary judgment in favor of Farmers. Plaintiff appeals and we affirm.

DISCUSSION

Standards of Review and Policy Interpretation

{6} "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Self v. United Parcel Serv., Inc.,* 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. Where issues on appeal involve only questions of law, we review those questions de novo. *Id.*

*2 [1][2][3][4] {7} The issue in this case concerns the interpretation of Plaintiff's insurance policy. We construe the insurance policy as a whole and determine whether ambiguities exist in the language of the contract. *See Rummel v. Lexington Ins. Co.,* 1997-NMSC-041, ¶¶ 19-20, 123 N.M. 752, 945 P.2d 970. When a term is undefined in the policy, we may look to that term's "usual, ordinary, and popular" meaning, such as found in a dictionary. *Battishill v. Farmers Alliance Ins. Co.,* 2006-NMSC-004, ¶ 8, 139 N.M. 24, 127 P.3d 1111 (internal quotation marks and citation omitted). A split in legal authority may be indicative of an ambiguity in the policy, but does not establish one. *Allgood v. Meridian Sec. Ins. Co.,* 836 N.E.2d 243, 248 (Ind.2005). When, and only when, an ambiguity is found, do we liberally construe the policy in favor of the insured. *Battishill,* 2006-NMSC-004, ¶ 17, 139 N.M. 24, 127 P.3d 1111.

[5][6][7] {8} We give the language in the policy its plain and ordinary meaning. *Cooper v. Chevron U.S.A., Inc.,* 2002-NMSC-020, ¶ 16, 132 N.M. 382, 49 P.3d 61. We do not "strain or torture" the language in order to "create an ambiguity." *State Farm Mut. Auto. Ins. Co. v. Luebbers,* 2005- NMCA-112, ¶ 9, 138 N.M. 289, 119 P.3d 169 (internal quotation marks and citation omitted), *cert. granted,* 2005-NMCERT-8, 138 N.M. 330, 119 P.3d 1267. "[T]he issue is how a reasonable insured would understand the term at the time of purchase." *Battishill,* 2006-NMSC-004, ¶ 11, 139 N.M. 24, 127 P.3d 1111. If the language in the policy is clear, this Court must then enforce the contract as written. *See Ponder v. State Farm Mut. Auto. Ins. Co.,* 2000-NMSC-033, ¶ 11, 129 N.M. 698, 12 P.3d 960.

"Loss" Does Not Include "Loss in Market Value" Under Plaintiff's Policy

[8] {9} Plaintiff's primary argument is that his policy should be broadly interpreted to include diminished market value plus the cost of repairs. In other words, Plaintiff claims that the phrase "direct and accidental loss of or damage to your insured car" must be interpreted broadly to include any type of "loss," including the diminished market value of his vehicle. We disagree.

{10} In the policy, the definitions of "loss" were set out in the alternative: loss was either the "loss of" the truck or "damage to" the truck. The plain meaning of "loss of" a vehicle in a collision is that the vehicle was a complete loss. *See* 6 John Alan Appleman & Jean Appleman, *Insurance Law & Practice* § 3881, at 359 (1972) (stating that the "total loss" of a vehicle occurs "when the cost of repairs exceeds the value of the vehicle, or where the automobile cannot be restored to the same condition as before the accident"). Here, Plaintiff concedes that there was not a "total loss" of his truck. Instead, there was "damage to" the truck, which was satisfactorily repaired. While the vehicle's reputation might suffer after a collision, any "damage to" the truck must be "direct" under Plaintiff's policy. *See Black's Law Dictionary* 964 (8th ed.2004) (defining a "direct loss" as a "loss that results immediately and proximately from an event" and a "consequential loss" as a "loss arising from the results of damage rather than from the damage itself ... [a]lso termed *indirect loss* "); *see also Webster's Third New International Dictionary* (unabridged) 640 (1993) (variously defining "direct" as "marked by absence of an intervening agency, instrumentality, or influence: IMMEDIATE," "stemming immediately from a

source," "characterized by or giving evidence of a close esp. logical, causal, or consequential relationship," and "INEVITABLE"); *see also Cooper,* 2002-NMSC-020, ¶ 16, 132 N.M. 382, 49 P.3d 61 (stating that policy language must be given its plain and ordinary meaning).

*3 {11} Plaintiff's loss of market value cannot be shoe-horned into the coverage for direct damage to his truck. *See Ponder,* 2000-NMSC-033, ¶ 11, 129 N.M. 698, 12 P.3d 960. Contrary to Plaintiff's arguments, the policy's language cannot be interpreted as broad enough to "cover any loss to the pre-collision position of the consumer" and does not contain a promise to compensate the insured with the full panoply of damages available in tort.

Plaintiff May Not Recover Under the "Limits of Liability" Section of His Policy

{12} Plaintiff contends that, because neither the "Exclusions" portion nor other portions of the policy excludes loss of market value from the broad definition of "loss," the policy must provide coverage for diminished market value. Contrary to Plaintiff's suggestion, it was not necessary for Farmers to specifically exclude a loss in market value unless the insurance policy, when read as a whole, actually includes such coverage. *See Am. Mfrs. Mut. Ins. Co. v. Schaefer,* 124 S.W.3d 154, 160 (Tex.2003) ("Absence of an exclusion cannot confer coverage."). We have already discussed how such coverage is not included in the "Loss" section of Plaintiff's policy. To read the policy as a whole, we must now consider this provision in relation to the rest of the policy to determine whether the policy extends coverage to include diminution in value following repairs. *See Rummel,* 1997-NMSC-041, ¶ 20, 123 N.M. 752, 945 P.2d 970.

{13} The "Limits of Liability" section of Plaintiff's policy reads:

> Our limits of liability for loss shall not exceed:
> 1. The amount which it would cost to repair or replace damaged or stolen property with other of like kind and quality; or with new property less an adjustment for physical deterioration and/or depreciation.

This section, set forth in the disjunctive, allows Farmers to repair or replace at its option. It is not contested either that Farmers chose the former option or that this case does not involve repairs that were inadequate or somehow problematic.

[9] {14} Farmers limited its liability to an amount that would "not exceed ... [t]he amount which it would cost to repair or replace damaged ... property." Farmers contends that this language unambiguously does not constitute a promise to pay for diminished market value. We agree.

{15} The "repair" of a physical thing (like a vehicle) is commonly defined as "to restore by replacing a part or putting together what is torn or broken" and is synonymous with "FIX" and "MEND." *Webster's New Third International Dictionary, supra,* at 1923. "Replace" has two meanings: (1) to restore something or someone "to a former place, position, or condition" and (2) to "provide a substitute or successor for." *Id.* at 1925. The latter definition would apply, since Plaintiff's policy states that replacements are made " *with ... other* of like kind and quality." Since it is uncontested that no "substitution" is involved in this case, we see harmony in regarding both repair and replacement to encompass restoration of Plaintiff's vehicle from its damaged state.

*4 {16} The modern majority of cases agree that "repair or replace" unambiguously refers to physical restoration of the vehicle. "[R]epair means to restore something to its former condition, not necessarily to its former value." *See Allgood,* 836 N.E.2d at 247; *see also Pritchett v. State Farm Mut. Auto. Ins. Co.,* 834 So.2d 785, 791 (Ala.Civ.App.2002) ("The various definitions of repair do not discuss the concept of value. We do not believe that in its common usage, the term 'repair' is understood to encompass the concept of value or require a restoration of value."); *O'Brien v. Progressive N. Ins. Co.,* 785 A.2d 281, 290 (Del.2001) (holding that the "repair or replace" language in the plaintiff's policy was "not ambiguous and that this language does not contemplate payment for diminution of value. In the common usage, the word 'repair' means to fix by replacing or putting together what is broken, or ... to bring back to good or useable condition." (internal quotation marks and citation omitted)); *Siegle v. Progressive Consumers Ins. Co.,* 819 So.2d 732, 736 (Fla.2002) (holding that the insurer's obligation to "repair or replace" the vehicle "is limited to the amount necessary to return the car to substantially the same condition as before the loss. Nowhere does that obligation include liability for loss due to a stigma on resale resulting from market psychology" (internal quotation marks and citation omitted)); *Campbell v. Markel Am. Ins. Co.,* 822 So.2d 617, 627 (La.Ct.App.2001) ("[T]he better view of the 'repair or replace' limitation is that it caps [the insurer's] liability at the cost of returning

the damaged [vehicle] to substantially the same physical, mechanical, and cosmetic condition as existed before the loss. There is no concept of 'value' in the ordinary meaning of the word 'repair.' To ascribe to the words 'repair or replace' an obligation to compensate the insured for things that, by their very nature, cannot be 'repaired' or 'replaced' would violate the most fundamental rules of contract construction."); *Hall v. Acadia Ins. Co.,* 801 A.2d 993, 995 (Me.2002) ("The act of repairing an object typically focuses upon restoring the object's function and purpose, and not upon returning the object to its earlier worth or value."); *Given v. Commerce Ins. Co.,* 440 Mass. 207, 796 N.E.2d 1275, 1280 (Mass.2003) ("There is nothing exotic about the words 'repair or replace' as used in the standard policy--both words, in their ordinary usage, refer to the remedying of tangible, physical damage."); *Lupo v. Shelter Mut. Ins. Co.,* 70 S.W.3d 16, 22 (Mo.Ct.App.2002) ("There is no concept of 'value' in the ordinary meaning of the word repair."); *Schulmeyer v. State Farm Fire & Cas. Co.,* 353 S.C. 491, 579 S.E.2d 132, 135 (S.C.2003) ("There is no concept of value in the ordinary meaning of" the words "repair" or "replace."); *Culhane v. W. Nat'l Mut. Ins. Co.,* 704 N.W.2d 287, 295 (S.D.2005) ("[T]he ordinary meaning of the words 'repair' and 'replace' indicate [sic] something physical and tangible."); *Schaefer,* 124 S.W.3d at 158-59 ("The concept of 'repair' with regard to a vehicle connotes something tangible, like removing dents or fixing parts. We do not believe that the ordinary or generally accepted meaning of the word 'repair' connotes compensating for the market's perception that a damaged but fully and adequately repaired vehicle has an intrinsic value less than that of a never-damaged car." (citations omitted)). *But see State Farm Mut. Auto. Ins. Co. v. Mabry,* 274 Ga. 498, 556 S.E.2d 114, 120-22 (Ga.2001) (allowing recovery for diminished market value because of 75 years of Georgia precedent that incorporate@s a value element into "repair" so "that the insured will be made whole" (internal quotation marks and citation omitted)). We agree with the majority of authorities that a promise to compensate the insured for diminished market value is not included within the notion of fixing a vehicle. *See Culhane,* 704 N.W.2d at 298-99. A reasonable insured would not read these phrases any other way, because diminished market value following a collision cannot be repaired, fixed, or mended as we understand those terms. *See O'Brien,* 785 A.2d at 290-91; *Allgood,* 836 N.E.2d at 247-48; *Hall,* 801 A.2d at 996; *Given,* 796 N.E.2d at 1280 ("We will not torture the plain meaning of the terms 'repair' and 'replace' to encompass 'repair' or 'replace [ment]' of damage caused by stigma, a form of damage that, by definition, defies remedy by way of 'repair' or 'replace[ment].' " (alterations in original)).

***5** [10] {17} We therefore hold that the "repair or replace" language in Plaintiff's policy does not intimate a promise to Plaintiff to pay for diminished market value. We believe that cases to the contrary, like *Mabry,* incorporate the tort concept of making the injured whole into the idea of "repair." *See Mabry,* 556 S.E.2d at 121. This measure of damages does not belong in our interpretation of an insurance policy. *See, e.g., Ray v. Farmers Ins. Exch.,* 200 Cal.App.3d 1411, 246 Cal.Rptr. 593, 595 (Ct.App.1988); *Given,* 796 N.E.2d at 1278-79; *Culhane,* 704 N.W.2d at 297; *Bickel v. Nationwide Mut. Ins. Co.,* 206 Va. 419, 143 S.E.2d 903, 905 (Va.1965).

[11] {18} Plaintiff's policy caps Farmers' liability to what it would cost to "repair or replace damaged or stolen property *with other* of *like kind and quality.*" (Emphasis added). Plaintiff argues that the phrase "like kind and quality" would give a reasonable insured the expectation that diminished market value was covered under his or her policy. We disagree.

{19} When the property here (Plaintiff's truck) was physically repaired, it was necessary that any *replacements* be "of like kind and quality." The phrase "repair ... with other of like kind and quality" is nonsensical, indicating that "like kind and quality" was not meant to modify "repair."

> [T]his contract makes clear that "like kind and quality" refers to "replace," not "repair" which encompasses the notion of restoring property to its former condition. Only to the extent parts are replaced does a "repair" entail "property of like kind or quality." To say one would repair an item with goods of like kind or quality is simply not correct English. An item of property (or a part of that item) is "replaced" with other property, but it is "repaired" with tools and labor. We therefore conclude that "like kind and quality" unambiguously refers only to replacement, not to repairs[.]

*Allgood,* 836 N.E.2d at 247-48.

{20} Even to the extent that a reasonable insured might misinterpret "with other of like kind and quality" as pertaining to "repair," to then interpret these phrases to encompass diminished market value would not be reasonable. "Like" in this context means "the same or nearly the same (as in nature, appearance, or quantity)." *Webster's Third New*

*International Dictionary, supra,* at 1310. "Kind" in this context refers to "a specific variety: TYPE, BRAND." *Id.* at 1243. "Quality" variously refers to "degree of excellence: GRADE, CALIBER" and "degree of conformance to a standard (as of a product or workmanship)." *Id.* at 1858. While these definitions, separated from their context, might support Plaintiff's argument, putting these ideas back into context defeats it. We believe that

> whether or not intrinsic value generally inheres in the word "quality," and assuming without deciding that the phrase "of like kind and quality" modifies both "repair" and "replace," we must look to the ordinary meaning of the words that are modified. We have said that the words "repair" and "replace," with regard to a vehicle, connote something tangible, like removing dents, fixing parts, or replacing the vehicle with a comparable substitute. Thus, if an insurer elects to repair a vehicle and must replace parts in doing so, it must use parts "of like kind and quality." Likewise, if an insurer elects to replace the vehicle, it must do so with a vehicle "of like kind and quality."

*6 *Schaefer,* 124 S.W.3d at 160; *see also Siegle,* 819 So.2d at 736 (interpreting "like kind and quality" to "require that the insurer place the insured in possession of a car 'the same or nearly the same' as the damaged auto, in terms of the 'fundamental nature' and 'degree of excellence' of the automobile" (citation omitted)).

{21} Therefore, while we agree that the meanings of "like," "kind," and "quality," may include a value element, that element is lost when these words are put into the context of Plaintiff's policy as a whole. *See Rummel,* 1997- NMSC-041, ¶ 20, 123 N.M. 752, 945 P.2d 970. We thus disagree with cases like *Hyden v. Farmers Insurance Exchange,* 20 P.3d 1222 (Colo.Ct.App.2000), which found ambiguity in the phrase "like kind and quality" without grounding those few words in the rest of the policy, or even the remainder of the sentence. *See id* . at 1225 (allowing recovery for diminished market value because there is "and" between "like kind and quality," instead of "or"). We hold that a reasonable insured could not read "diminished market value" into the phrase "like kind and quality" in the context of Plaintiff's policy.

Payment of Loss

[12] {22} In the "Payment of Loss" section of Plaintiff's policy, Farmers stated that it would "pay the loss in money or repair or replace damaged ... property." Farmers contends that no reasonable insured could read an additional payment for diminished market value into this provision. We agree.

{23} This provision clearly sets forth three options in the disjunctive: money payment, repair, or replacement. This language does not contain words like "and" or phrases like "in addition to ." This provision does not contemplate a cash payment for diminished market *in addition* to repairs.

"Lesser Of" Compared to "Shall Not Exceed"

{24} Plaintiff contends that cases that have disallowed diminished market value are "entirely useless to this appeal" because they analyzed policies that limited the insurer's liability to the "lesser of" the available options. In his policy there is no such language. He therefore argues that the policy language in this case that Farmers' liability "shall not exceed" the repair or replacement of damaged property "with other of like kind and quality" means that Farmers will "pay no more than a 'ceiling' as the highest cost of its loss," whereas policies that use "lesser of" language obligate the insurer to pay no more than required by the lowest-cost alternative. We disagree with this interpretation. Plaintiff is essentially arguing that, if a policy includes "lesser of" or "lower of" language, the insurer has a choice, but if the policy uses "shall not exceed" language, the insurer must pay the highest-cost alternative.

{25} This trivial difference in language has no impact on our analysis. We have relied on the above cases only to the extent that they analyze language in Plaintiff's policy. Furthermore, there are a number of cases that have disallowed diminished market value where the policies contained the same or similar "will not exceed" language that is in Plaintiff's policy. *See, e.g., Gen. Accident Fire & Life Assurance Corp. v. Judd,* 400 S.W.2d 685, 686-87 (Ky.Ct .App.1966) (disallowing recovery of diminished market value where the plaintiff's policy stated that the insurer's liability would "not exceed the actual cash value ... nor what it would then cost to repair or replace the property"); *Given,* 796 N.E.2d at 1277 (disallowing recovery of diminished market value where the insurer's liability was limited to "never pay[ing] more than what it would cost to repair or replace the damaged property" (internal quotation marks omitted)); *Lupo,* 70 S.W.3d at 19, 23 (same).

Ambiguity and the Lack of a Specific Exclusion

*7 {26} Plaintiff contends that the policy is ambiguous because it has "elusive remedial alternatives," suffers from a "lack of narrowness and preciseness" in its limits of liability, and does not specifically exclude diminished market value. We disagree. As explained above, the options that Farmers had under the policy were clear: cash payment, repair, or replacement. Farmers clearly limited its liability to *one* of these three options, and a combination of these options is not implied. We hold that Plaintiff's policy, when read as a whole, unambiguously did not provide coverage for diminished market value in addition to adequate repairs. *See Ponder,* 2000-NMSC-033, ¶ 11, 129 N.M. 698, 12 P.3d 960 (stating that where the policy is clear, we enforce it as written). There was no need for Farmers to specifically exclude what was not covered under the policy. *See Siegle,* 819 So.2d at 740 (holding that "the existence or nonexistence of an exclusionary provision in an insurance contract is not at all relevant until it has been concluded that the policy provides coverage for the insured's claimed loss"); *Schaefer,* 124 S.W.3d at 160 (noting that, where an obligation to pay for diminished value is not included in the policy's language, the lack of an exclusion "cannot confer coverage").

The Matter of Choice, Good Faith, and Fair Dealing

[13] {27} The true issue in Plaintiff's brief is the matter of choice under his insurance policy. As explained above, Farmers' liability was limited to either physically repairing or replacing Plaintiff's damaged vehicle. Farmers could then pay for this loss in one of three ways: repairing or replacing the vehicle, or a cash payment. Farmers had options, and it obviously chose the least expensive to itself. Plaintiff's remaining element of loss does not transform his policy into a promise to pay for losses not covered by the policy. *See Siegle,* 819 So.2d at 740; *see also Culhane,* 704 N.W.2d at 296 ("While one may debate whether it is rational to only insure part of a loss, that debate is irrelevant because [the insurer's] indemnification obligation is governed by the terms of its contract. Stated in other words, the *contractual* indemnification obligation is not governed by [the plaintiff's] post-loss feeling of what should be reasonably or rationally covered."). To interpret Plaintiff's policy as including diminished market value would violate the plain language of Plaintiff's policy and negate the insurer's options. *See Siegle,* 819 So.2d at 739 (stating that including diminished value in the coverage under the policy "would negate the insurer's choice of remedy explicitly contained in the contractual text"); *Allgood,* 836 N.E.2d at 248 (noting that including an obligation to pay for diminished value in addition to the cost of repairs would render the language in the liability limitation section meaningless); *Lupo,* 70 S.W.3d at 22 (holding that interpretation of the contract's terms to include diminution in value "would go beyond the phrase's common prevailing meaning of which an ordinary insured would reasonably understand the phrase to mean," and would "render meaningless" the insurer's right to make a choice as expressed in the contract). We only reiterate what the plain language of the policy states: Farmers had three clear options, and paying diminished market value cannot be read into those options where Farmers has exercised the option to repair, and done so adequately.

*8 [14][15] {28} Yet Plaintiff argues that Farmers' decision to choose the least expensive alternative under the policy, and its failure to explain the legal uncertainty to him, was a breach of Farmers' duties of good faith and fair dealing. Where an insurer acts in accordance with the express language and obligations under an insurance policy, there is no violation of an implied covenant of good faith and fair dealing. *See Azar v. Prudential Ins. Co. of Am.,* 2003-NMCA-062, ¶ 49, 133 N.M. 669, 68 P.3d 909. As discussed in this opinion, Farmers complied with the express terms of the insurance policy in this case. Therefore, Farmers did not violate its duties to Plaintiff.

[16] {29} Plaintiff, citing to *Hendren v. Allstate Insurance Co.,* 100 N.M. 506, 672 P.2d 1137 (Ct.App.1983), claims that Farmers was required to "explain uncertainties in the law" that would affect the limits of Farmers' liability under Plaintiff's insurance policy. As we explained in *Hendren,* an insurer is not required to take such affirmative action as informing an insured of all "possible legal interpretations and judicial decisions" that might affect coverage. *Id.* at 511, 672 P.2d at 1142. However, an insurer that "takes it upon itself to offer advice" to an insured must "correctly state policy limits and uncertainties." *Id.* There is no suggestion that the insurer in this case acted in the same way as the insurer in *Hendren.* The holding in *Hendren* did not require Farmers to "explain uncertainties in the law" to Plaintiff.

[17] {30} Farmers notes that Plaintiff appears to raise the new theory on appeal that his vehicle should have been declared a total loss and replaced. Plaintiff insists that he has all along argued that Farmers was required to act in good faith, and that the "most appropriate" remedy for Plaintiff's claim under the

policy would have been "replacement with a deduction for depreciation of the wrecked vehicle." To the extent that Plaintiff is now claiming that his vehicle should have been declared a total loss, that argument was not brought to the attention of the trial court. *See Diversey Corp. v. Chem-Source Corp.*, 1998-NMCA-112, ¶ 38, 125 N.M. 748, 965 P.2d 332 (holding that preservation serves the purposes of allowing the trial court an opportunity to correct any errors, thereby avoiding the need for appeal, and creating a record from which the appellate court can make informed decisions). Below, Plaintiff consistently argued that he was entitled to payment for the diminished market value of his vehicle, but did not argue that he was entitled to have his vehicle declared a total loss and replaced. Therefore, we do not address this argument.

CONCLUSION

{31} We hold that Plaintiff's insurance policy was unambiguous in not providing coverage for the diminished market value of his truck following a collision, where his truck was adequately repaired. We hold that Farmers did not breach its duty of good faith and fair dealing when it did not explain this possibility to Plaintiff, or when it chose the least expensive of its options under the policy. We hold that Plaintiff did not preserve his argument that Farmers was obligated to replace his vehicle. We therefore affirm.

*9 {32} IT IS SO ORDERED.

WE CONCUR: LYNN PICKARD and CELIA FOY CASTILLO, Judges.

--- P.3d ----, 2006 WL 2545870 (N.M.App.), 2006-NMCA-099

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Appellate Court of Illinois,
Fifth District.
Michael SIMS and Tiffany Sims, on Behalf of Themselves and All Others Similarly Situated, Plaintiffs-Appellants,
v.
ALLSTATE INSURANCE COMPANY, Defendant-Appellee.
No. 5-04-0525.

May 31, 2006.

Background: Automobile owners brought class action lawsuit against automobile insurer, contending that insurer's failure to compensate them for the diminished value of their damaged but repaired vehicle constituted a breach of contract. The Circuit Court, St. Clair County, Lloyd A. Cueto, J., entered judgment on jury verdict for insurer, and automobile owners appealed.

Holding: The Appellate Court, Hopkins, J., held that policy did not require insurer to reimburse owners for the diminished value of their damaged but repaired vehicle.
Affirmed.

Welch, J., dissented with opinion.

West Headnotes

[1] Insurance 1863
217k1863
The construction of an insurance policy is a question of law.

[2] Insurance 1813
217k1813
When construing the language of an insurance policy, the court's primary objective is to ascertain and give effect to the intentions of the parties as expressed in their agreement.

[3] Insurance 1814
217k1814
When determining the parties' intentions as expressed in an insurance contract, the court must construe the policy as a whole, giving effect to every part.

[4] Insurance 1809
217k1809

[4] Insurance 1822
217k1822
An insurance policy must be construed according to the sense and the meaning of the terms, and if the language is clear and unambiguous, it must be given its plain, ordinary, and popular sense.

[5] Insurance 1832(2)
217k1832(2)

[5] Insurance 1835(2)
217k1835(2)
Although it is true that limitations on an insurer's liability must be construed liberally in favor of the policyholder, the rule comes into play only where there is an ambiguity.

[6] Insurance 1808
217k1808
A provision in an insurance policy is deemed ambiguous if it is subject to more than one reasonable interpretation.

[7] Insurance 1808
217k1808
An insurance contract provision is not rendered ambiguous simply because the parties do not agree on its meaning.

[8] Insurance 1808
217k1808
The touchstone in determining whether an ambiguity exists in an insurance policy is whether the relevant portion of the policy is subject to more than one reasonable interpretation, not whether creative possibilities can be suggested.

[9] Insurance 1832(2)
217k1832(2)
The rule construing ambiguous insurance policy provisions strictly against the insurer will not permit perversions of plain language to create an ambiguity where none in facts exists.

[10] Insurance 2719(2)
217k2719(2)
Automobile insurer was not required under insurance policy to reimburse automobile owners for the diminished value of their damaged but repaired vehicle; insurer had promised in "Limits of Liability" section "to repair or replace" the vehicle "with other of like kind and quality," but had not agreed to restore

the value of the vehicle, and policy allowed insurer to pay either the actual cash value of the vehicle or the amount necessary to repair, but did not require any combination of the two.

****702** Mark C. Goldenberg, Elizabeth V. Heller, Goldenberg, Miller, Heller & Antognoli, Edwardsville, Michael B. Hyman, Melinda J. Morales , Much Shelist Freed Denenberg Ament & Rubenstein, P.C., Chicago, Robert E. Becker, Kevin T. Hoerner, Becker Paulson Hoerner & Thompson, P.C., Belleville, Elizabeth J. Cabraser, Scott P. Nealey, Lieff, Cabraser, Heimann & Bernstein, LLP, San Francisco, CA, for Appellants.

Jeffrey P. Lennard, Richard L. Fenton, Margo Weinstein, Sonnenschein Nath & Rosenthal LLP, Chicago, Gordon R. Broom, Troy A. Bozarth, Burroughs Hepler Broom MacDonald Hebrank & True LLP, Edwardsville, H. Sinclair Kerr, Jr., Kerr & Wagstaffe LLP, San Francisco, CA, for Appellee.

Justice HOPKINS delivered the opinion of the court:

*****515 *998** The plaintiffs, Michael and Tiffany Sims, on behalf of themselves and all others similarly situated, filed a class action for a breach of contract against the defendant, Allstate Insurance Company (Allstate). ***999** The circuit court certified the class, determined that Allstate's insurance policy was ambiguous, and submitted the case to a jury. The jury returned a verdict in favor of Allstate.

****703 ***516** On appeal, the plaintiffs argue that the circuit court erred in allowing the jury to construe the insurance policy; that the circuit court abused its discretion in allowing Allstate to present evidence regarding its unilateral subjective intent; that the circuit court erred in instructing the jury regarding ambiguity, the burden of proof, and the principle of *contra proferentem;* that, as a matter of law, the insurance policy's limit-of-liability provision was ambiguous and therefore covered the plaintiffs' claims for a loss of value; and that Allstate improperly attacked the ethics and integrity of the plaintiffs' counsel. We affirm on other grounds.

FACTS

The plaintiffs' automobiles were damaged while insured by Allstate. Allstate paid the cost to repair each vehicle but did not compensate the plaintiffs for its diminished value (a repaired vehicle's loss in market value resulting from the fact that it suffered property damage). The plaintiffs initiated this class action, alleging that by failing to compensate them for their damaged but repaired vehicle's diminished value, Allstate breached its contract.

Allstate's collision and comprehensive coverages for an insured's automobile are governed by section six of its insurance policy. Section six is entitled "Protection Against Loss To The Auto," is substantially the same in each class state, and states as follows:

> "COVERAGE DD
> Auto Collision Insurance
> ALLSTATE will pay for direct and accidental loss to YOUR insured AUTO * * * (including insured loss to an attached trailer) from a collision with another object or by upset of that AUTO or trailer. * * *
>
> * * *
>
> COVERAGE HH
> Auto Comprehensive Insurance
> ALLSTATE will pay for direct and accidental loss to YOUR insured AUTO * * * not caused by collision. * * *
>
> * * *
>
> Payment Of Loss By Allstate
> ALLSTATE may pay for the loss in money, or may repair or replace the damaged or stolen property. * * *
> Limits of Liability
> ALLSTATE'S limit of liability is the actual cash value of the property or damaged part of the property at the time of loss. The ***1000** actual cash value will be reduced by the deductible for each coverage as shown on the declarations page. However, OUR liability will not exceed what it would cost to repair or replace the property or part with other of like kind and quality."

Prior to the trial, Allstate moved to dismiss the plaintiffs' action on the basis that the "Payment of Loss" and "Limits of Liability" provisions of the policy did not require Allstate to pay for diminished value. The circuit court determined that the insurance policy was ambiguous, and the court denied Allstate's motion to dismiss. The case was tried before a jury, and the jury rendered a general verdict in favor of Allstate. The circuit court denied the plaintiffs' posttrial motion, and the plaintiffs filed a timely appeal.

ANALYSIS

The plaintiffs argue that the diminished value of an adequately repaired vehicle is a "direct and accidental

loss" that Allstate is required to compensate under the policy's insuring provision. Allstate does not dispute that the term "loss" could encompass a vehicle's diminished value, but it contends **704 ***517 that the insuring language must be construed in light of the "Limits of Liability" and "Payment of Loss" sections. Allstate argues that these provisions are clear and unambiguous and preclude an insured's recovery for a vehicle's diminished value.

The plaintiffs counter that the phrase "repair or replace * * * with other of like kind and quality" in the "Limits of Liability" section encompasses an inherent concept of value, is at the least ambiguous, and therefore requires Allstate to compensate the plaintiffs for their vehicles' diminution in value. The plaintiffs argue that because the policy requires that a repair or replacement be of "like kind and quality," the vehicle must be repaired so that there is no remaining physical damage and no loss in value and that, otherwise, Allstate must pay to compensate its insured for the vehicle's diminished value.

While a vehicle's diminished value may be a "loss" under the policy's insuring provision, we agree with Allstate that its obligation to compensate the insured for that loss is circumscribed by the plain language of the policy's "Limits of Liability" and "Payment of Loss" sections.

[1][2][3][4] "The construction of an insurance policy is a question of law." *Pekin Insurance Co. v. Estate of Goben,* 303 Ill.App.3d 639, 642, 236 Ill.Dec. 689, 707 N.E.2d 1259 (1999). "When construing the language of an insurance policy, the court's primary objective is to ascertain and give effect to the intentions of the parties as expressed in their agreement." *Pekin Insurance Co.,* 303 Ill.App.3d at 642, 236 Ill.Dec. 689, 707 N.E.2d 1259. When determining the parties' intentions as expressed in the contract, the court must construe the policy as a *1001 whole, giving effect to every part. *Hartford Accident & Indemnity Co. v. Case Foundation Co.,* 10 Ill.App.3d 115, 121, 294 N.E.2d 7 (1973); *Miller v. Madison County Mutual Automobile Insurance Co.,* 46 Ill.App.2d 413, 417, 197 N.E.2d 153 (1964). An insurance policy must be construed according to the sense and the meaning of the terms, and if the language is clear and unambiguous, it must be given its plain, ordinary, and popular sense. *Pekin Insurance Co.,* 303 Ill.App.3d at 642, 236 Ill.Dec. 689, 707 N.E.2d 1259.

[5][6][7][8][9] "Although it is true that limitations on an insurer's liability must be construed liberally in favor of the policyholder [citation], the rule comes into play only where there is an ambiguity." *Menke v. Country Mutual Insurance Co.,* 78 Ill.2d 420, 424, 36 Ill.Dec. 698, 401 N.E.2d 539 (1980). "A provision in an insurance policy is deemed ambiguous if it is subject to more than one reasonable interpretation." *Economy Fire & Casualty Co. v. Bassett,* 170 Ill.App.3d 765, 769, 121 Ill.Dec. 481, 525 N.E.2d 539 (1988). A contract provision is not rendered ambiguous simply because the parties do not agree on its meaning. *Johnstowne Centre Partnership v. Chin,* 99 Ill.2d 284, 288, 76 Ill.Dec. 80, 458 N.E.2d 480 (1983). "While it is highly important that ambiguous clauses should not be permitted to serve as traps for policy[ ]holders, it is equally important to the policy[ ]holders, as well as to the insurer, that definite and clear provisions, upon which the calculations of the company are based, should be maintained unimpaired by loose or ill-considered interpretation." *Coons v. Home Life Insurance Co. of New York,* 368 Ill. 231, 238, 13 N.E.2d 482 (1938). The touchstone in determining whether an ambiguity exists is whether the relevant portion of the policy is subject to more than one reasonable interpretation, not whether creative possibilities can be suggested. *Bruder v. Country Mutual Insurance Co.,* 156 Ill.2d 179, 193, 189 Ill.Dec. 387, 620 N.E.2d 355 (1993). "[T]he ***518 **705 rule construing ambiguous provisions strictly against the insurer will not permit perversions of plain language to create an ambiguity where none in facts exists." *Miller,* 46 Ill.App.2d at 418, 197 N.E.2d 153; see also *Hobbs v. Hartford Insurance Co. of the Midwest,* 214 Ill.2d 11, 17, 291 Ill.Dec. 269, 823 N.E.2d 561 (2005).

[10] The "Limits of Liability" section of the policy states that Allstate's liability "will not exceed what it would cost to repair or replace the property or part with other of like kind and quality." Allstate has promised "to repair or replace the property or part with other of like kind and quality," but there is no promise to restore the value of the vehicle. See *Allgood v. Meridian Security Insurance Co.,* 836 N.E.2d 243, 247 (Ind.2005). The plain and ordinary meanings of "repair" and "replace" connote the remedying of tangible, physical damage. See Webster's Third New International Dictionary 1923 (1993) ("repair" means "to restore by replacing a part or putting together what is torn or broken"); Black's Law Dictionary 1298 (6th ed.1990) ("repair" means "[t]o mend, remedy, restore, renovate" or "[t]o *1002 restore to a sound or good state after decay, injury, dilapidation, or partial destruction"); Webster's Third

New International Dictionary 1925 (1993) ("replace" means to "restore to a former place, position, or condition"); Black's Law Dictionary 1299 (6th ed.1990) ("replace" means "to restore to a former condition"). By their definitions and the common understanding of the terms, "repair" and "replace" mean to restore something to its former condition, not to its former value. See *Allgood,* 836 N.E.2d at 247-48 ("[d]iminution in value can be compensated, but it cannot be 'repaired' or 'replaced' "); *Culhane v. Western National Mutual Insurance Co.,* 2005 SD 97, ¶ 24, 704 N.W.2d 287, 295 (2005) ("the ordinary meaning of the words 'repair' and 'replace' indicate something physical and tangible"); *Given v. Commerce Insurance Co.,* 440 Mass. 207, 212-13, 796 N.E.2d 1275, 1280 (2003) (the plain meaning of the terms "repair" and "replace" do not encompass "repair" or "replace[ment]" of damage caused by stigma, a form of damage that, by definition, defies a remedy by way of "repair" or "replace [ment]"); *American Manufacturers Mutual Insurance Co. v. Schaefer,* 124 S.W.3d 154, 158 (Tex.2003) (the term "repair" with regard to a vehicle connotes something tangible, like removing dents or fixing parts, not value); *Hall v. Acadia Insurance Co.,* 2002 ME 110, ¶ 7, 801 A.2d 993, 995 (2002) (" [t]he act of repairing an object typically focuses upon restoring the object's function and purpose, and not upon returning the object to its earlier worth or value"); see also *Townsend v. State Farm Mutual Automobile Insurance Co.,* 34,901, p. 9 (La.App. 2 Cir. 8/22/01); 793 So.2d 473, 478 (general prevailing meaning of "repair" is to fix, restore, or mend physical damage and does not encompass the restoration of value, an item of damage that cannot be physically repaired); *Carlton v. Trinity Universal Insurance Co.,* 32 S.W.3d 454, 464 (Tex.App.2000) (there is no concept of value in the ordinary meanings of "repair" and "replace"). "Ascribing to the words 'repair or replace' an obligation to compensate the insured for things [ *i.e.,* diminished market value] which, by their very nature, cannot be 'repaired' or 'replaced' would violate the most fundamental rules of contract construction." *Carlton,* 32 S.W.3d at 464; see also *O'Brien v. Progressive Northern Insurance Co.,* 785 A.2d 281, 290-91 (Del.2001).

To expand the ordinary meaning of "repair or replace * * * with other of like kind and quality" to include an intangible, diminished-value element would be ignoring the policy's language or giving the ***519 **706 policy's text a meaning never intended. *Siegle v. Progressive Consumers Insurance Co.,* 819 So.2d 732, 738 (Fla.2002); see also *Schaefer,* 124 S.W.3d at 160 (to require the insurer, who elects to repair, to additionally pay cash for the market's diminished perception incorporates *1003 an intangible-value element into the repair provision that simply does not exist in the policy's language). The Indiana Supreme Court has explained:

> " '[L]ike kind and quality' refers to 'replace,' not 'repair[,]' which encompasses the notion of restoring property to its former condition. Only to the extent parts are replaced does a 'repair' entail 'property of like kind or quality.' To say one would repair an item with goods of like kind or quality is simply not correct English. An item of property (or a part of that item) is 'replaced' with other property, but it is 'repaired' with tools and labor. * * * '[L]ike kind and quality' unambiguously refers only to replacement, not to repairs, and the verb 'restore' appears nowhere in the policy." *Allgood,* 836 N.E.2d at 247-48.

If an insurer elects to repair a vehicle and must replace parts in doing so, it must use parts of "like kind and quality," and if an insurer elects to replace the vehicle, it must do so with a vehicle of "like kind and quality." See *Schaefer,* 124 S.W.3d at 160. The limit-of-liability provision includes no reference to diminished value or the restoration of value, and the plain and ordinary meaning of the provision's language precludes an insured's recovery for the diminished market value of a damaged but repaired vehicle.

Additionally, the language of the "Limits of Liability" provision demonstrates that Allstate knew how to say "value" when it meant "value." See *Townsend,* 34,901, p. 10; 793 So.2d at 479. Allstate's limit of liability is "the actual cash value of the property or damaged part of the property at the time of loss," but Allstate's liability "will not exceed what it would cost to repair or replace the property or part with other of like kind and quality." Allstate therefore has the option to pay the actual cash value of the property or part at the time of the loss *or* to pay the cost to repair the property or to replace the property or part with one of like kind and quality. If Allstate's policy provision was intended to guarantee the market value of the automobile after an election to repair, Allstate would have used the phrase "actual cash value" instead of "like kind and quality." See *Ray v. Farmers Insurance Exchange,* 200 Cal.App.3d 1411, 246 Cal.Rptr. 593 (1988); see also *Camden v. State Farm Mutual Automobile Insurance Co.,* 66 S.W.3d 78, 82 (Mo.App.2001) (the term "repair," particularly considering that it is the option contrary

to cash value, does not inherently include the concept of value). The policy's language allows the insurer to choose to pay either the actual cash value of the vehicle or the amount necessary to repair, not some combination of the two. If a combination of the two were allowed, the insurer's obligation to compensate the loss would be cumulative-repair or replace *and* pay ***1004** diminished value, and the language does not so provide. See *Schaefer,* 124 S.W.3d at 159.

In addition to applying the plain meaning of the policy's language, we must also read the policy as a whole, giving effect to the "Payment of Loss" provision. See *Hartford Accident & Indemnity Co.,* 10 Ill.App.3d at 121, 294 N.E.2d 7. Pursuant to this section of the policy, the insurer has an option to "pay for the loss in money, or may repair or replace the damaged or stolen property." Including diminished value in the terms "repair or replace" would force an insurer that chooses to compensate a loss by exercising the "repair ****707 ***520** or replace" option to also pay money, ignoring the clause's disjunctive language and rendering the clause meaningless. See *Schaefer,* 124 S.W.3d at 160. Although the plaintiffs argue that the trial testimony demonstrated that Allstate generally declined to utilize its right to repair the vehicle, because it would be assuming the duty of having the repairs made with due care, the policy as a whole is facially unambiguous; therefore, we interpret the policy as a matter of law, without resorting to extrinsic evidence. See *Air Safety, Inc. v. Teachers Realty Corp.,* 185 Ill.2d 457, 462, 236 Ill.Dec. 8, 706 N.E.2d 882 (1999). The policy does not contemplate the repair or replacement of property or parts plus an additional payment of money for unrepairable diminished value. See *Culhane,* 2005 SD at ¶ 23, 704 N.W.2d at 295.

We find no ambiguity in the contractual terms of Allstate's automobile insurance policy. The policy clearly does not allow an insured to recover for a diminution in value. See *Allgood,* 836 N.E.2d 243 (the phrase "repair or replace the property with other property of like kind and quality" is not ambiguous and does not allow the insured to recover for the repaired vehicle's diminished value); *Culhane,* 2005 SD 97, 704 N.W.2d 287 (an unambiguous policy requires the insurer to restore the vehicle to its preloss physical and operating condition, not to compensate for its loss of value); *Given,* 440 Mass. 207, 796 N.E.2d 1275 (no objectively reasonable insured would conclude that "repair" or "replace" includes compensation for a diminution in market value or for anything else beyond the restoration of the vehicle's precollision physical condition); *Schaefer,* 124 S.W.3d 154 (the phrase "repair or replace the property with other of like kind and quality" ***1005** clearly requires the insurer to restore the vehicle to its preloss physical and operating condition, not its preloss value); *Schulmeyer v. State Farm Fire & Casualty Co.,* 353 S.C. 491, 579 S.E.2d 132 (2003) (there was no concept of value in the policy's "repair or replacement" terminology); *Hall,* 2002 ME 110, 801 A.2d 993 (the unambiguous "repair" language of the policy precludes a recovery for a diminution in value, a loss that cannot be repaired); *Siegle,* 819 So.2d 732 (the phrase "repair or replace the property with other of the like kind and quality" clearly limited the insurer's liability to a monetary amount necessary to repair the car's function and appearance, not value); *O'Brien,* 785 A.2d 281 (under the unambiguous " repair or replace" limitations in the policy, the insurer was obligated to repair or replace vehicle parts only to the extent necessary to return the automobile to substantially the same physical, operating, and mechanical condition, but not the value it had before the accident); see also *Pritchett v. State Farm Mutual Automobile Insurance Co.,* 834 So.2d 785 (Ala.Civ.App.2002) (the words "repair" and "with like kind and quality" do not connote a return to market value); *Camden,* 66 S.W.3d 78 (diminished value is not a covered loss pursuant to the unambiguous language of the policy); *Townsend,* 34,901, p. 13; 793 So.2d at 480 (the insurer's liability was limited to the cost of restoring the damaged automobile "to substantially the same physical condition [not value] as before the accident"); *Johnson v. State Farm Mutual Automobile Insurance Co.,* 157 Ariz. 1, 754 P.2d 330 (App.1988) (the phrase "pay to repair or replace the property or part with like kind and quality" contemplates the restoration of physical condition, rather than the restoration of value); *Ray,* 200 Cal.App.3d 1411, 246 Cal.Rptr. 593 (the policy language unambiguously required the insurer to restore the automobile to its precollision condition, but not to its precollision value).

****708 ***521** We recognize that some jurisdictions have reached the opposite conclusion regarding similar policy provisions. *State Farm Mutual Automobile Insurance Co. v. Mabry,* 274 Ga. 498, 556 S.E.2d 114 (2001) (the provision affording the insurer the option to repair serves only to abate, not eliminate, the insurer's liability for a diminution in value); *Venable v. Import Volkswagen, Inc.,* 214 Kan. 43, 519 P.2d 667 (1974) (when the insurer elects to repair or rebuild, the insurer is obligated to put the

vehicle in substantially the same condition as it was prior to the collision, to render it as valuable and as serviceable as before); *Potomac Insurance Co. v. Wilkinson,* 213 Miss. 520, 57 So.2d 158 (1952) (if, despite repairs, there remains a loss in actual market value, that deficiency is added to the cost of the repairs); *Dunmire Motor Co. v. Oregon Mutual Fire Insurance Co.,* 166 Or. 690, 114 P.2d 1005 (1941) (a replacement means the restoration of the property to its preinjury condition, and a restoration is not complete unless there is no diminution of value after the repair of the vehicle); see also *Hyden v. Farmers Insurance Exchange,* 20 P.3d 1222 (Colo.App.2000) (the phrase "of like kind and quality" is ambiguous so that when the insurer promises to provide a vehicle "of like kind and quality," the insurer must provide the insured, through repair, replacement, and/or compensation, the means of acquiring a vehicle substantially similar in function and value to that which the insured had prior to the accident). We ***1006** respectfully decline to join the opposing jurisdictions that have ignored the policy's clear and unambiguous language to give the policy's text a meaning never intended.

We conclude, as a matter of law, that the language of this policy, when read as a whole, is clear and unambiguous, requires Allstate to restore the insured's vehicle to preaccident mechanical function and condition, and does not require Allstate to compensate its insured for a repaired vehicle's loss in market value due to the fact that it suffered damage. Accordingly, the circuit court erred in finding that the policy language was ambiguous and sending the case to a trial before a jury. We find in favor of Allstate, as a matter of law, and we need not address the plaintiffs' remaining arguments on appeal.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the circuit court of St. Clair County in favor of Allstate, for reasons other than those relied on by the circuit court.

Affirmed.

SPOMER, P.J., concurs.

Justice WELCH, dissenting:

I respectfully dissent. As set forth in the majority opinion, the insurance policy provides that Allstate will "pay for direct and accidental loss to YOUR insured AUTO" (collision coverage) and that Allstate will "pay for direct and accidental loss to YOUR insured AUTO * * * not caused by collision" (comprehensive coverage). Allstate does not dispute that the term "loss" could include a vehicle's diminished value. In addition, there is no dispute that the policy fails to explicitly exclude from coverage, after the vehicle's repair, the loss sustained because of the vehicle's diminished value. Because the provisions in the policy do not exclude the loss sustained by a repaired vehicle's diminished value, I believe there is an ambiguity in the policy that must be construed against Allstate as the drafter. If Allstate, the drafter of the insurance policy, did not want its insureds to reasonably believe that they would be compensated for the entire loss, including the diminished value of the vehicle, Allstate should have specifically ****709 ***522** so stated in the policy. The policy could have stated, "The term 'loss' in this policy does not include the diminished value of an insured vehicle," to avoid any ambiguity regarding this coverage. Because I believe that a reasonable person, after reviewing the policy, would believe that the coverage would return him or her to the same financial ***1007** position he or she was in immediately prior to the accident, I must respectfully dissent.

365 Ill.App.3d 997, 851 N.E.2d 701, 303 Ill.Dec. 514

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

| | |
|---|---|
| DAVID MOELLER,<br><br>Appellant/<br>Cross Respondent,<br><br>v.<br><br>FARMERS INSURANCE COMPANY OF WASHINGTON and FARMERS INSURANCE EXCHANGE,<br><br>Respondents/<br>Cross Appellants. | No. 30880-1-II<br><br>CERTIFICATE OF SERVICE AND FILING |

I, Debbie L. Dern, certify that at all times mentioned herein I was and now am a citizen of the United States of America and a resident of the state of Washington, over the age of eighteen years, not a party to the proceeding or interested therein, and competent to be a witness therein. My business address is that of Stoel Rives LLP, 3600 One Union Square, 600 University Street, Seattle, Washington 98101.

On September 15, 2006, I caused a true and correct copy of the following documents to be served upon the following individuals in the manner indicated:

1. Statement of Additional Authorities; and

2. Certificate of Service and Filing.

| | |
|---|---|
| Stephen M. Hansen<br>Lowenberg, Lopez & Hansen, P.S.<br>Suite 450, Rust Building<br>950 Pacific Avenue<br>Tacoma, WA 98402-4441 | ☐ hand delivery<br>☐ facsimile transmission<br>☐ overnight delivery<br>☒ mailing with postage prepaid |
| Andrew N. Friedman<br>Cohen, Milstein, Hausfeld & Toll, PLLC<br>1100 New York Avenue NW, Suite 500 W<br>Washington, DC 20005-3964 | ☐ hand delivery<br>☐ facsimile transmission<br>☐ overnight delivery<br>☒ mailing with postage prepaid |
| Debra Brewer Hayes<br>Reich & Binstock<br>4265 San Felipe, Suite 1000<br>Houston, TX 77027 | ☐ hand delivery<br>☐ facsimile transmission<br>☐ overnight delivery<br>☒ mailing with postage prepaid |
| Elizabeth Cabraser<br>Scott P. Nealey<br>Lieff, Cabraser, Heimann & Bernstein, LLP<br>275 Battery Street, 30th Floor<br>San Francisco, CA 94111-3339 | ☐ hand delivery<br>☐ facsimile transmission<br>☐ overnight delivery<br>☒ mailing with postage prepaid |

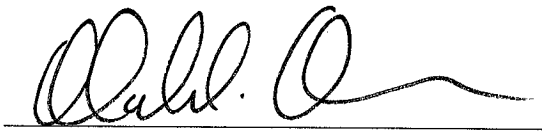
On the same date, I caused an original and one copy of the documents to be mailed, via first class mail, with postage prepaid, for filing, to:

David Ponzoha, Clerk/Administrator
Court of Appeals, Division II
950 Broadway, #300

Tacoma, WA 98402

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed on September 15, 2006, at Seattle, Washington.



Debbie L. Dern, Legal Secretary